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EXAMINER	
GHALI, ISIS A D	

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICKY W. PURCELL,
Appellant

Appeal 2008-5410
Application 10/645,447[1]
Technology Center 1600

Decided: March 31, 2009[2]

Before CAROL A. SPIEGEL, TONI R. SCHEINER, and FRANCISCO C. PRATS, *Administrative Patent Judges*.

SPIEGEL, *Administrative Patent Judge*.

DECISION ON APPEAL

I. Statement of the Case

Appellant appeals under 35 U.S.C. § 134 from an Examiner's twice rejection of claims 40-43, 46, and 47. Claims 32-39 and 49-62, the only

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[1] Application 10/645,447 ("the 447 application") was filed 20 August 2003. The real party in interest is KIMBERLY-CLARK WORLDWIDE, INC. (Appeal Brief, filed 26 December 2007 ("App. Br."), at 2).

[2] The two month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

other pending claims, have been withdrawn from consideration. (App. Br. 4; Ans.[3] 2) We have jurisdiction under 35 U.S.C. § 6(b). We AFFIRM.

The subject matter on appeal is directed to a system used to provide therapy to a portion of a body. Claim 40 is illustrative and reads (App. Br. 16, emphasis added):

> 40. A system for providing therapy to a portion of a body, the system comprising:
>
> a container that includes at least one compartment;
>
> a first patch held by said container, wherein said first patch applies a first therapy to the portion of the body when said first patch engages the portion of the body;
>
> a second patch held by said container, wherein said second patch applies a second therapy to the portion of the body when said second patch engages the portion of the body, the second therapy being different than the first therapy; and
>
> a flexible wrap held by said container, the flexible wrap being adapted to secure at least one of said first patch and said second patch to the portion of the body, *wherein the first patch, the second patch and the flexible wrap are all within the same compartment in the container.*

The Examiner has provisionally rejected all of the pending claims, claims 32-43, 46, 47, and 49-62 as unpatentable under the judicially created doctrine of obviousness-type double patenting over claims 1-39 of copending application 10/954,754 in view of Rolf[4] (Ans. 3-4).

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[3] Examiner's Answer mailed 25 March 2008 ("Ans.").

[4] U.S. Patent 5,741,510 C1, *Adhesive Patch for Applying Analgesic Medication to the Skin*, reissued 30 April 2002, to Rolf et al. ("Rolf").

The Examiner has also rejected claims 40, 41, 43, 46, and 47 as unpatentable under 35 U.S.C. § 102(b) over Westplate[5] (Ans. 5-6); and, claim 42 as unpatentable under 35 U.S.C. § 103(a) over the combined teachings of Westplate and Zhang[6] (Ans. 6-7).

The dispositive issue for the art-based rejections is whether Westplate describes "a container that includes at least one compartment" in combination with "wherein the first patch, the second patch and the flexible wrap are *all within the same compartment* in the container" as recited in claim 40 (emphasis added).

II. Findings of Fact ("FF").

[1] Figure 1 of the 447 application depicts a system 10 for providing therapy to a portion of a body, wherein system 10 includes a first patch 14, a second patch 16, a third patch 18, and a flexible wrap 20, all within the same compartment of a container 12 (specification of the 447 application ("Spec.") at 4:20-5:5; 5:25-27). Figure 1 is reproduced below.

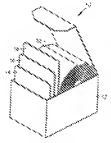


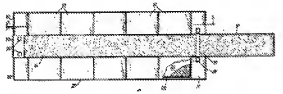
FIG. 1

[5] U.S. Patent 4,592,358, *Therapeutic Device*, issued 3 June 1986, to Wayne J. Westplate ("Westplate").

[6] U.S. Patent 6,245,347 B1, *Methods and Apparatus for Improved Administration of Pharmaceutically Active Compounds*, issued 12 June 2001, to Zhang et al. ("Zhang").

{Figure 1 of the 447 application depicts a perspective view of a system comprising three patches and a wound-up flexible wrap contained within a box.}

[2] Figure 1 of Westplate depicts a therapeutic device 10 which may be applied to a bodily injury, wherein device 10 includes a plurality of individual compartments 12 into which individual cooling, heating, and/or weight packets 21 may be placed, and a "Velcro" strap means 16 which permits device 10 to be wrapped around the body portion and then attached to itself via its extended end (Westplate 4:65-5:5; 5:25-28 and 54-58). Figure 1 of Westplate is reproduced below.



{Figure 1 of Westplate depicts a front view of one embodiment of a therapeutic device described by Westplate.}

[3] According to Zhang, a heating patch can be placed on top of a dermal drug delivery patch to deliver the drug more effectively into the systemic circulation (Zhang abstract; 3:54-61; 5:23-26).

III. Discussion

A. Provisional obviousness-type double patenting rejection

Appellant has not furnished any substantive arguments against the Examiner's provisional obviousness-type double patenting rejection (App. Br. 9). Therefore, we summarily AFFIRM the Examiner's rejection of claims 40-43, 46, and 47 under the judicially created doctrine of obviousness-type double patenting over claims 1-39 of copending application 10/954,754 in view of Rolf.

B. Art-based rejections

1. Legal principles

Anticipation requires a prior art reference to describe every limitation in a claim either explicitly or inherently. *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997); *see also Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989) (an anticipating reference must describe all claimed aspects of the invention).

2. Analysis

According to the Examiner, "the device 10 disclosed by US '358 [Westplate] is an inherent container containing different packets and a flexible wrap" (Ans. 11). However, the system of claim 40 requires the different packets/patches and the flexible wrap to be *all within the same compartment* in the container. While device 10 of Westplate may be considered to be a container having at least one compartment 12, and first and second patches/packets 21 (FF 2), the Examiner has not pointed out, and we do not find, where Westplate describes the patches/packets 21 *and the wrap 16* being within the same compartment 12 of device 10 as depicted in Figure 1 or any other disclosure of Westplate. Since Westplate does not describe every limitation of claim 40, neither claim 40 nor its dependent claims 41, 43, 46, and 47 are anticipated or rendered obvious by Westplate. Since Zhang does not remedy this deficiency in Westplate, the combination of Westplate and Zhang also fails to describe every limitation of claim 40.

Therefore, we reverse the rejection of claims 40, 41, 43, 46, and 47 under § 102 over Westplate and the rejection of claim 41 under § 103 over the combined teachings of Westplate and Zhang.

3. Conclusion

Westplate does not describe "a container that includes at least one compartment" in combination with "wherein the first patch, the second patch and the flexible wrap are all within the same compartment in the container" as recited in claim 40.

IV. Order

Upon consideration of the record, and for the reasons given, it is

ORDERED that the decision of the Examiner to provisionally reject claims 40-43, 46, and 47 as unpatentable under the judicially created doctrine of obviousness-type double patenting over claims 1-39 of copending application 10/954,754 in view of Rolf is AFFIRMED,

FURTHER ORDERED that the decision of the Examiner to reject claims 40, 41, 43, 46, and 47 as unpatentable under 35 U.S.C. § 102(b) over Westplate is REVERSED,

FURTHER ORDERED that the decision of the Examiner to reject claim 42 as unpatentable under 35 U.S.C. § 103(a) over the combined teachings of Westplate and Zhang is REVERSED, and

FURTHER ORDERED that no period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Appeal 2008-5410
Application 10/645,447

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